

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE THOMPSONS FILM, LLC,

Plaintiff,

v.

DOES 1 - 194,

Defendants.

Case No. C13-0560RSL

ORDER LIFTING STAY AND
EXTENDING SERVICE DEADLINE

This action was filed on March 28, 2013. Each of the Doe defendants is identified only by an IP address linked to the on-line sharing of the movie “The Thompsons.” Plaintiff asserts direct, contributory, and indirect copyright infringement claims against each Doe defendant. The Court granted plaintiff’s motion to initiate early discovery from internet service providers in order to obtain information sufficient to identify the owner of each IP address.

On May 9, 2013, the Court issued an order to show cause acknowledging concerns regarding the propriety of joinder and the possibility that plaintiff was using the judicial authority of the United States to wrest improvident settlements from *pro se* litigants under threat of huge statutory penalties. The Court stayed the above-captioned matter and required plaintiff to provide copies of all written communications with the owners of the IP addresses and summaries of all oral communications with those

1 individuals. In addition, the Court ordered plaintiff to show cause why the case should
2 not be dismissed for improper joinder and/or pursuant to the Court's inherent authority to
3 control its docket. On May 31, 2013, Doe 51 filed a "Motion to Sever & Dismiss and/or
4 Issue a Protective Order" (Dkt. # 27) related to the joinder issue. Having reviewed
5 plaintiff's response to the order to show cause and the motion to sever, the Court finds as
6 follows:

7 **A. Joinder**

8 Federal Rule of Civil Procedure 20(a)(2) imposes two specific requirements
9 for the permissive joinder of defendants. First, the right to relief against defendants must
10 arise out of "the same transaction, occurrence, or series of transactions or occurrences."
11 Fed. R. Civ. P. 20(a)(2)(A). Second, there must be some question of law or fact common
12 to all defendants. Fed. R. Civ. P. 20(a)(2)(B). Taking the well-pled factual allegations of
13 the complaint as true and considering the declarations of plaintiff's investigator, the Court
14 finds that these requirements are easily met. Plaintiff's investigator found that a user of
15 the IP addresses identified in this action possessed a pirated copy of "The Thompsons,"
16 that each copy was a reproduction of the same original, and that plaintiff's investigator
17 downloaded a portion of the pirated copy from each defendant. The Court finds that
18 defendants' knowing participation in an on-line media distribution swarm, the purpose of
19 which was to distribute copies of a single original and which actually resulted in such
20 distribution, is a series of transactions or occurrences that justifies joinder under Rule
21 20(a)(2)(A). The Court declines to require allegations or evidence that each defendant
22 directly exchanged data with every other defendant. Such a requirement would ignore the
23 realities of how the BitTorrent system works, including its planned anonymity and
24 universal donor aspects. Neither the language of the Rule nor the policies behind it
25 suggest that direct contact between participants in a group is necessary to justify joinder.
26

1 The Court further finds that litigating this case will involve common
2 questions of fact and/or law regarding the existence of a swarm, the alleged downloads,
3 plaintiff's ownership of the copyright, and the elements of infringement. The fact that
4 persons associated with the IP addresses may have individual defenses to plaintiff's
5 claims does not change the fact that there will be some common questions of law or fact:
6 not all of the legal and factual issues must be identical as to all defendants. Patrick
7 Collins, Inc. v. Does 1-21, 282 F.R.D. 161, 168 (E.D. Mich. 2012).

8 Although the specific requirements of Rule 20 are met, the Court must also
9 determine whether permissive joinder will "comport with the principles of fundamental
10 fairness." Coleman v. Quaker Oats Co., 232 F.3d 1271, 1296 (9th Cir. 2000). Factors
11 relevant to this determination include the possible prejudice to any party, delay caused by
12 joinder, the motives for joinder, the closeness of the relationship between the joined
13 parties, notice to the parties, and the effect of joinder on jurisdictional issues. Desert
14 Empire Bank v. Ins. Co. of N. Am., 623 F.2d 1371, 1375 (9th Cir. 1980). In the Ninth
15 Circuit, "[w]e start with the premise that Rule 20 . . . is to be construed liberally in order
16 to promote trial convenience and to expedite the final determination of disputes, thereby
17 preventing multiple lawsuits." League to Save Lake Tahoe v. Tahoe Reg'l Planning
18 Agency, 558 F.2d 914, 916-17 (9th Cir. 1977).

19 Jointly litigating the facts related to the swarm plaintiff has identified and
20 the legal issues related to infringement is more efficient for plaintiff and the Court than
21 litigating 194 suits involving only one IP address each. In addition, the nature of the
22 swarm and the BitTorrent protocol, with its many pieces and multiple sources, suggests
23 that joint litigation may be necessary for plaintiff to substantiate its theory that defendants
24 acted in concert to download copyrighted material, even if the segment downloaded from
25 a particular defendant, considered alone, might not constitute copyright infringement.
26

1 Defendants, on the other hand, gain no appreciable advantage through individual
2 litigation: in either case, defendants will be able to offer individual defenses to the
3 allegations. Nor does there appear to be any significant risk of liability by association.¹
4 Jointly litigating these claims also allows defendants, many of whom will undoubtedly
5 proceed *pro se*, to pool resources, rely on arguments raised by other defendants, and/or
6 benefit from the participation of retained counsel. The only potential advantage to
7 severance appears to be the hope that plaintiff will give up its claims, no matter how
8 meritorious, in the face of mounting costs. If, as the Court is willing to assume at this
9 stage in the proceeding, plaintiff's allegations are true and its copyright has been
10 infringed, such a result is neither just nor fair.

11 The Court further finds that there is no indication that joinder will impact
12 the Court's subject matter jurisdiction and that defendants' alleged participation in a
13 knowing and intentional file-sharing scheme constitutes interrelated acts justifying joint
14 litigation even if defendants remained unaware of the identity of their fellow BitTorrent
15 users.

16 The Court is, however, concerned about the impact that joinder has had on
17 the handling of similar litigation pending in this district and how that handling reflects on
18 plaintiff's motives for amassing the group of defendants in this case. To be clear, the
19 Court finds that joinder under Rule 20 for purposes of prosecuting copyright infringement
20 claims against members of a swarm in a single lawsuit can be appropriate. If, upon
21 receipt of identifying information regarding the individuals associated with the IP
22 addresses at issue, plaintiff timely affects service and actually prosecutes this case, the
23 goals of efficiency, justice, and expeditious resolution of the dispute will be served. If,
24

25 ¹ Contra Voltage Pictures, LLC v. Does 1-12, No. 2:13-292-AA, 2013 WL 1900597 (D. Or. May
26 4, 2013) (finding availability of statutory damages and potential that unintentional infringers could be
prejudiced by being sued along with original seeder and/or serial infringers precludes joinder).

1 however, service is not affected and the pendency of this action is simply used as a
2 cudgel, mass joinder will cause delay and raise all sorts of potential for abuse, as
3 discussed more fully below.

4 In the circumstances of this litigation, the Court finds that joint litigation
5 against numerous participants in a single swarm satisfies the specific requirements of
6 Rule 20(a)(2) but that the joinder may ultimately create a procedural imbalance which,
7 left unchecked, would not comport with the principles of fundamental fairness.

8 **B. Lack of Service**

9 Pursuant to Fed. R. Civ. P. 4(m), “[i]f a defendant is not served within 120
10 days after the complaint is filed, the court – on motion or on its own after notice to the
11 plaintiff – must dismiss the action without prejudice against that defendant or order that
12 service be made within a specified time.” The time for service has now passed, but
13 plaintiff had more than two months left on the service clock when the above-captioned
14 matter was stayed. There is reason to doubt whether timely service would have been
15 affected in the absence of the stay, however. Even when plaintiff learned the identity of
16 persons associated with the IP addresses at issue in this case, it delayed service in favor of
17 pursuing discovery and settlement negotiations.²

18 As subscribers became aware of the lawsuit, they predictably began
19 contacting plaintiff’s counsel in order to obtain information. Counsel apparently
20 collected identifying information and sent a demand letter, a sheet of “Frequently Asked
21 Questions,” a copy of the complaint, and a waiver of service of summons form. Plaintiff
22 has not provided a copy of its Release & Settlement Agreement – presumably because
23

24 ² The packet sent to individuals who contacted counsel included a demand letter, a copy of the
25 complaint, and two copies of the waiver of service of summons form. There is, however, no indication
26 that plaintiff included a prepaid means of returning the form as required by Fed. R. Civ. P. 4(d)(1)(C).
Nor were any proofs of actual service filed as required by Fed. R. Civ. P. 4(l).

1 negotiations did not proceed to that point before the stay was entered – but the
2 information available to the Court raises concerns regarding overreaching and procedural
3 unfairness.

4 Plaintiff’s demand letter and FAQ sheet paint a dire portrait of the
5 recipient’s situation. Plaintiff emphasizes the risk of huge damage awards (nine mentions
6 of statutory penalties and/or judgments of \$150,000 or more)³ and the possibility of an
7 attorney’s fee award (at least eight references, including a warning that fees “can be
8 thousands; tens of thousands if the matter proceeds to trial”). Plaintiff also warns that
9 additional claims for spoliation could be filed against the recipient, that being named in
10 the lawsuit increases the risk that other copyright holders will take an interest in the
11 recipient’s activities, and even that failure to settle could ultimately result in the loss of
12 the recipient’s house if he or she is unable to pay the judgment amount. Plaintiff demands
13 a sizeable settlement amount, which is available for only two weeks before it jumps even
14 higher. Plaintiff’s advice regarding the association of counsel (the court will not appoint
15 counsel in a civil suit), the validity of possible defenses (failure to password protect
16 and/or monitor the use of your internet connection generates liability), and the bankruptcy
17 code (this type of debt would likely be nondischargeable) is suspect. Finally, plaintiff
18 invites the recipient to provide access to his or her computer or other evidence proving
19 that he or she did not download “The Thompsons.”

20 When plaintiff sought permission to conduct discovery in this case, it
21 represented the discovery as both limited and efficacious: by subpoenaing subscriber
22 identification information from the ISPs, plaintiff would be able to pursue this lawsuit and
23

24 ³ The \$1,500,000 damage award touted in the FAQs was a default judgment entered when
25 defendant failed to appear. Contrary to plaintiff’s supposition, there is no indication that the court
26 considered the viral nature of the BitTorrent protocol when it granted plaintiff’s unopposed demand for
statutory damages.

1 protect its copyrights. It turns out, however, that identifying the account holder may tell
2 us very little about who actually downloaded “The Thompsons” using that IP address. As
3 one court noted, “it is no more likely that the subscriber to an IP address carried out a
4 particular computer function . . . than to say an individual who pays the telephone bill
5 made a specific telephone call.” In re BitTorrent Adult Film Copyright Infringement
6 Cases, 2012 WL 1570765, at *3 (E.D.N.Y. May 1, 2012). In fact, it is less likely. Home
7 wireless networks are ubiquitous, meaning that a single IP address can simultaneously
8 support multiple computer devices throughout the home and, if not secured, additional
9 devices operated by neighbors or passersby. Thus, the risk of false positives is very real.
10 Digital Sin, Inc. v. Does 1-176, 279 F.R.D. 239, 243 (S.D.N.Y. 2012). It is not clear that
11 plaintiff could, consistent with its obligations under Fed. R. Civ. P. 11, make factual
12 contentions regarding an internet subscriber’s infringing activities based solely on the fact
13 that he or she pays the internet bill. Plaintiff seems to be aware of this problem and has
14 refrained from identifying the Doe defendants more specifically even after it learns the
15 name of the subscriber. Plaintiff does not, however, take the appropriate step of returning
16 to the Court to seek permission to conduct additional discovery. Rather, plaintiff
17 demands that the subscriber prove he or she did not download “The Thompsons.”
18 Therein lies the rub. Plaintiff has effectively obtained access to unrepresented individuals
19 and parleyed that access into open-ended and unlimited discovery, despite the very
20 narrow discovery order entered by the Court.

21 In this context, the 120-day service deadline is the only thing that limits
22 plaintiff’s unsanctioned discovery expedition. If plaintiff feels it has enough information
23 to satisfy its Rule 11 requirements by simply identifying the subscriber associated with an
24 IP address, it should serve the complaint and initiate litigation subject to the limitations
25 imposed by the rules of civil procedure. If, on the other hand, plaintiff would have
26

1 trouble justifying a factual contention that the internet subscriber must, by virtue of that
2 fact, be the downloader, it could seek an extension of the service deadline, explaining
3 why it was unable to obtain the information in a timely manner and identifying steps to be
4 taken that would allow litigation to begin. If those steps include additional discovery,
5 further permission of the Court would be necessary.

6 In short, plaintiff must actually prosecute the claims it has asserted. Instead,
7 plaintiff's litigation strategy seems to be to use the pendency of this action to create a
8 period of time in which it can scare subscribers into settlement as the only means of
9 avoiding both litigation costs and harsh statutory penalties. The communications disclosed
10 to the Court show that plaintiff makes every effort to educate subscribers regarding the
11 statutory penalties he or she faces. Coupled with the clear implication that evidence of IP
12 address ownership is legally sufficient to establish copyright infringement and the demand
13 that the subscriber prove his or her innocence, it is not surprising that subscribers –
14 whether guilty or not – may choose to settle. While the risk of improvident settlements
15 and overreaching cannot be eradicated, the Court will enforce not only the procedural rules
16 that favor plaintiff, but also those that protect defendants. Absent extraordinary and
17 unforeseeable circumstances, the service deadline in this case will be strictly enforced in
18 order to reduce the risk of overreaching.

19 C. Protective Order

20 Doe 51 objects to the subpoena issued to his ISP, arguing that the
21 information sought is not likely to lead to the discovery of the person who used his IP
22 address to download "The Thompsons" and that the disclosure of his contact information
23 will cause him annoyance, embarrassment, oppression, and undue burden/expense.
24 Although there is no guarantee that the subscriber associated with a certain IP address was
25 the person who downloaded the movie, discovery regarding the subscriber's identity is
26

1 plainly relevant under the Federal Rules of Civil Procedure. In some instances, the
2 subscriber is, in fact, the one who infringed plaintiff's copyright. At the very least, the
3 subscriber is likely to have information regarding the users of the IP address that would
4 lead to the discovery of the actual infringer. Doe 51's relevance related objections to the
5 subpoena (Dkt. # 27 at 14-19) are overruled.

6 Nor has Doe 51 established that the disclosure of his name, address, email
7 address, and Media Access Control address would cause embarrassment or undue burden
8 in the circumstances presented here. "The Thompsons" is a horror thriller: being
9 identified in a lawsuit involving the film is not socially damaging in the same way that
10 being associated with a pornographic film would be. To the extent that plaintiff's
11 litigation strategy poses a risk of overreaching or oppression, the Court will require
12 plaintiff to timely investigate and prosecute the claims asserted within the confines of the
13 litigation. Precluding discovery of identifying information altogether would prevent
14 copyright holders from enforcing their rights in the BitTorrent context, no matter how
15 meritorious the claim or how blatant or widespread the infringement. While the Court is
16 cognizant of the need to balance the various interests at issue in this litigation, a
17 prohibition on early discovery, no matter how targeted and innocuous, tilts the balance too
18 far in the favor of the putative defendants.

19
20 For all of the foregoing reasons, Doe 51's motion to sever or dismiss and
21 request for a protective order (Dkt. # 27) is DENIED. The stay of the above-captioned
22 case is hereby lifted and plaintiff may again pursue identifying information regarding the
23 Doe defendants from the ISPs pursuant to the Court's prior discovery order.⁴ Plaintiff
24 shall have eighty days from the date of this Order to complete discovery and affect service.

25
26 ⁴ Doe 128's request for oral argument (Dkt. # 31) is DENIED.

1 Failure to file proof of service on or before the eightieth day will result in the dismissal of
2 plaintiff's claims as to each unserved defendant.

3
4 Dated this 7th day of August, 2013.

5 

6 Robert S. Lasnik
7 United States District Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26